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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 576

CAPTAIN HOWARD BRETT LEVY, for himself and for all others similarly situated,

Petitioners,

—v.—

HONORABLE HOWARD F. CORCORAN, United States District Judge,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

PAGE

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit 1

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 5

Reasons for Granting the Writ

I. Certiorari Should Be Granted to Review the Standard Employed by the District Court and the Court of Appeals to Determine the Scope of the Issues That May Be Decided by a Single Judge in Three-Judge Litigation 13

II. Certiorari Should Be Granted to Determine Whether the Rule of *Dombrowski* v. *Pfister* Applies to Military Penal Legislation and Military Prosecutions 18

A. The *Dombrowski* issue is a question of first impression and vital importance to the constitutional protection of vast numbers of Americans 20

PAGE

B. The narrow reading of *Dombrowski* by the courts below conflicts with the liberal reading given that decision by the Court of Appeals for the Second Circuit 28

C. It is particularly appropriate to grant review in petitioner's case at the present time because of the pendency of other cases before the Court that raise broad questions of the scope and significance of the *Dombrowski* decision 31

D. In their rejection of *Dombrowski*, the courts below have given a broad reading to this Court's decisions in *Gusik* v. *Schilder*, *Orloff* v. *Willoughby*, and *Beard* v. *Stahr*, which sets those decisions into conflict not only with the rationale of *Dombrowski*, but also with the Court's holdings in *Toth* v. *Quarles* and *Reid* v. *Covert* 32

CONCLUSION 35

TABLE OF CASES, STATUTES AND AUTHORITIES CITED

Cases:

Baggett v. Bullitt, 377 U. S. 360 (1964) 17
Bailey v. Patterson, 369 U. S. 31 (1962) 15
Beard v. Stahr, 370 U. S. 41 (1962) 32, 34
Bond v. Floyd, 385 U. S. 116 (1966) 17
Burns v. Wilson, 346 U. S. 137 (1953) 22

PAGE

California Water Service Co. v. City of Redding, 304 U. S. 252 (1938) 16
Cameron v. Johnson, 381 U. S. 741 (1965) 32
Cameron v. Johnson, 262 F. Supp. 873 (S. D. Miss. 1966), O. T., 1966, Misc. No. 1773 32
Cleary v. Bolger, 371 U. S. 392 (1963) 20

Dombrowski v. Pfister, 380 U. S. 479 (1965) .....*passim*
Douglas v. City of Jeannette, 319 U. S. 157 (1943) 20

Gusik v. Schilder, 340 U. S. 128 (1950) 22, 32, 33, 34

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U. S. 713 (1962) 9, 15

Levy, etc. v. McNamara, et al., D. D. C., C. A. No. 953-67 .....*passim*
Levy v. Resor, E. D. S. C., C. A. No. 67-442, decided July 6, 1967 12
Levy v. Resor, U. S. C. M. A., Misc. No. 67-9, decided July 7, 1967 12

Metropolitan Water Co., Ex parte, 220 U. S. 539 (1911) 15
Miller v. United States, 324 F. 2d 730 (10th Cir. 1963) 27

N. A. A. C. P. v. Button, 371 U. S. 415 (1963) 6, 20
Neagle, Ex parte, 135 U. S. 1 (1890) 33
Northern Pacific Ry. Co., Ex parte, 280 U. S. 142 (1929) 15

Orloff v. Willoughby, 345 U. S. 83 (1953) 32, 34

Poresky, Ex parte, 290 U. S. 30 (1933) 15, 16

PAGE

Reaves v. Ainsworth, 219 U. S. 296 (1910) 34
Reed Enterprises v. Corcoran, 354 F. 2d 519 (D. C. Cir. 1965) 8, 16
Reid v. Covert, 354 U. S. 1 (1957) 33
Royall, Ex parte, 117 U. S. 241 (1886) 20

Stamler v. Willis, 371 F. 2d 413 (7th Cir. 1966) 16
Stefanelli v. Minard, 342 U. S. 117 (1951) 20
Stratton v. St. Louis Southern Ry. Co., 282 U. S. 10 (1930) 15

Toth v. Quarles, 350 U. S. 11 (1955) 33

United States v. Howe, U. S. C. M. A., No. 19846, decided August 4, 1967 23

Wolff v. Selective Service Local Board No. 16, 372 F. 2d 817 (2d Cir. 1967) 28, 29, 30, 31

Zwicker v. Boll, O. T., 1967, Misc. No. 573 32
Zwickler v. Koota, 261 F. Supp. 985 (E. D. N. Y. 1966), O. T., 1967, No. 29 31-32

United States Constitution:

First Amendment ..... *passim*

Statutes:

U. C. M. J., Arts.

88, 10 U. S. C. §888 (1964) 23
90, 10 U. S. C. §890 (1964) 4, 6, 7, 11
133, 10 U. S. C. §933 (1964) 4, 5, 6, 7, 11, 23
134, 10 U. S. C. §934 (1964) 4, 5, 6, 7, 11, 27

PAGE

28 U. S. C.

§1254(1) (1964) 2

§2281 (1964) 13, 15, 18

§2282 (1964) 3, 7, 13, 15, 18

§2283 (1964) 13, 18

§2284 (1964) 7, 8, 13, 17, 18

Other Authorities:

Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964) 16, 18

Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. REV. 181 (1962) 23, 33, 34

New York Times

January 22, 1966, 6:4 24

July 8, 1966, 1:2 24

July 15, 1966, 3:2 24

May 31, 1967, 53:5 24

June 2, 1967, 6:4 24

June 4, 1967, 1:3 25

June 5, 1967, 22:4 25

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HONORABLE HOWARD F. CORCORAN, United States District Judge,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on May 9, 1967, Chief Judge Bazelon dissenting. The judgment sought to be reviewed denied petitioner's application for a writ of mandamus to compel the Honorable Howard F. Corcoran, a judge of the District Court, to request convening of a statutory three-judge court in a matter pending before him, styled *Levy, etc.* v. *McNamara, et al.*, D. D. C., C. A. No. 953-67. Rehearing in the mandamus action was denied June 7, 1967.

Opinions Below

The opinion of the District Court in the underlying action, *Levy, etc.* v. *McNamara et al.*, is not reported. It is set forth in the Appendix, pp. 37-45, *infra*. The District Court's order appears in the Appendix, at p. 43, *infra*. The order and opinions of the Court of Appeals denying petitioner's application for a writ of mandamus are not yet reported. That order together with the separate opinions of Circuit Judges Tamm and Leventhal and Chief Judge Bazelon (dissenting) are set forth in the Appendix, pp. 46-69, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered May 9, 1967. Motion for rehearing was denied by the Court of Appeals on June 7, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) (1964).

Questions Presented

Petitioner's complaint in the District Court sought the injunction of three Articles of the Uniform Code of Military Justice on the ground that they were vague and overbroad and had been discriminatorily applied to suppress free speech protected by the First Amendment. Restraint of petitioner's court martial, wherein he was charged with military crimes for acts protected by the First Amendment was also sought. The District Court declined to convene a statutory three-judge court on the ground that a civil court

"has no jurisdiction . . . to interfere with the operation of the military." The Court of Appeals denied mandamus.

(1) Did the Court of Appeals apply a proper standard under 28 U. S. C. §2282 (1964) in holding that a single district judge could preempt three-judge consideration of the question whether civil courts have "jurisdiction" to enjoin military statutes and prosecutions that exert a "chilling effect" upon First Amendment freedoms?

(2) Is this Court's decision in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), so conclusively inapplicable to military prosecutions that a three-judge court need not be convened to consider the question of first impression whether military penal statutes overreaching First Amendment freedoms can be enjoined by a federal district court?

Constitutional and Statutory Provisions Involved

This case involves the First Amendment to the Constitution of the United States.

This case also involves 28 U. S. C. §2282 (1964), as follows:

> §2282. *Injunction against enforcement of Federal statute; three-judge court required.*
>
> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

The case further involves Articles 90, 133 and 134 of the Uniform Code of Military Justice, 10 U. S. C. §§890, 933, and 934 (1964), respectively as follows:

§890. *Assaulting or willfully disobeying superior commissioned officer.*

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

§933. *Conduct unbecoming an officer and a gentleman.*

Any commissioned officer, cadet, or midshipman who is convicted for conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

§934. *General article.*

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offence, and shall be punished at the discretion of that court.

Statement of the Case

Petitioner Howard B. Levy was a medical doctor serving as a Captain in the Army and assigned to be in charge of the Dermatology Clinic in the United States Army Hospital at Fort Jackson, South Carolina. He disagreed with the Administration's position in Viet Nam. He expressed this disagreement in a number of conversations between February and December 1966, which were heard by Army Special Forces personnel at the hospital. On these occasions he uttered (or was later charged with uttering) language ranging in temperance from "the United States is wrong in being involved in the Viet Nam war" to "Special Forces personnel are . . . killers of peasants and murderers of women and children." He said that Negroes were discriminated against in the United States, and that they should refuse to go to Viet Nam or to fight in Viet Nam. Previously, in September 1965, he had written a letter to a soldier stationed in Viet Nam expressing the same views.

In December 1966, military prosecutions were begun against Levy, charging that his conversations were criminal. As the charges subsequently developed, they asserted that those conversations violated Articles 133 and 134 of the Uniform Code of Military Justice (U. C. M. J.), p. 4 *supra*. Article 133 makes criminal "conduct unbecoming an officer and a gentleman." Article 134 is the catch-all provision of the U. C. M. J., penalizing "all disorders and neglects to the prejudice of good order and discipline . . . , all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital" which are not elsewhere "specifically mentioned" in the Code. Levy's let-

ter to the soldier in Viet Nam was later made the basis for two additional charges under Articles 133 and 134. Also, Levy was charged under Article 90 of the Code with failing to obey an order to train Army Special Forces personnel in dermatology. (Levy's version of this latter affair is that he declined to participate in a program that required him, as a doctor, to expose the private parts of female military dependants, under his treatment, to viewing by non-medical corpsmen; and that, in any event, the Article 90 charge was being maintained, not to punish him for disobedience, but as a device to intimidate and harass him because of his criticism of the Viet Nam war and his supposed subversive character.)

On April 17, 1967, prior to his trial by court martial, Levy filed in the United States District Court for the District of Columbia an action styled *Levy, etc.* v. *McNamara et al.*, C. A. No. 953-67. The action challenged the constitutionality of Articles 133 and 134, on their face and as applied to suppress free expression, contending that those articles failed to meet the "strict" standard of permissible statutory vagueness applicable in the First Amendment area. *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432 (1963). Levy alleged that the speech conduct for which he was charged was constitutionally protected and that his prosecution was selective and discriminatory and designed to stifle criticism of the Administration's position in Viet Nam. As to the charge under Article 90, Levy asserted that this, like the charges under Articles 133 and 134, was being employed as an instrument of political repression and harassment. The suit was brought as a class action, on behalf of Levy and other persons similarly situated—i.e., military personnel who wished to criticize the United States

policy in Viet Nam but were intimidated in the exercise of their right of free expression by the threat of prosecutions like Levy's. It sought (1) declarations of the unconstitutionality of Articles 133 and 134 on their face and as applied; (2) injunction of enforcement of these articles; (3) a declaration of the unconstitutionality of Article 90 as applied to suppress free speech; (4) an injunction of the enforcement of Article 90 as so appplied; and (5) preliminary and permanent injunction of Levy's court martial, scheduled to begin on May 10, 1967, on the ground that this prosecution would have a "chilling effect" on free speech within *Dombrowski* v. *Pfister,* 380 U. S. 479, 487 (1965). Levy accompanied his complaint with an application for a preliminary injunction, also filed April 17.

Since federal statutes were sought to be enjoined as unconstitutional, a three-judge court was requested under 28 U. S. C. §2282 (1964). The defendants, however, opposed the convening of a statutory three-judge court. While conceding that Levy was being prosecuted as alleged, under Articles 133, 134 and 90, and that the charges under Articles 133 and 134 were based upon speech conduct in the nature of conversations and a private letter, the defendants urged that a three-judge court was not required because, *inter alia,* the district court lacked "subject matter jurisdiction," Levy had not exhausted his military remedies, no irreparable injury justifying equitable relief was shown, there was no justiciable controversy, and the statutes under which Levy was prosecuted were constitutional.

Instead of "immediately" notifying the Chief Judge of the Circuit of the pendency of an action requiring a court of three judges, 28 U. S. C. §2284(1) (1964), District Judge Corcoran set the case for argument on April 28 on Levy's

motion for a preliminary injunction and the defendants' objections thereto and to the convening of a three-judge court. At that hearing, counsel for Levy, noting that the May 10 date on which the court martial was scheduled to begin was fast approaching, and that a preliminary injunction to restrain the enforcement of a federal statute on grounds of unconstitutionality could not be issued by a single judge, moved orally for a temporary restraining order, pursuant to 28 U. S. C. §2284(3) (1964), until such time as a court of three judges could meet to hear the application for a preliminary injunction.

On May 3, 1967 Judge Corcoran issued his opinion and order, adopting the view of the defendants that the court lacked "subject matter jurisdiction" of the cause, and therefore denying Levy's application for a preliminary injunction and declining to initiate proceedings for the convening of a statutory three-judge court. That opinion is set forth in the Appendix, pp. 37-43, *infra*.

On May 8, 1967 Levy commenced the present proceeding by filing his petition for a writ of mandamus in the Court of Appeals for the District of Columbia Circuit, asking that Judge Corcoran be ordered to convene a three-judge court in *Levy, etc.* v. *McNamara et al.*, conformably to law.[1] Contemporaneously with the filing of the petition for mandamus, Levy filed an application for a stay, asking that the Court of Appeals restrain the court martial proceeding against Levy, scheduled for May 10, pending disposition of the mandamus action and the convening of a three-judge

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[1] This form of procedure is appropriate in the District of Columbia Circuit. See *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519 (D. C. Cir. 1965).

court to hear the application for a preliminary injunction in *Levy, etc.* v. *McNamara et al.*

At 11:30 a.m. on May 9, the mandamus action was heard by a motions panel of the Court of Appeals (Chief Judge Bazelon and Circuit Judges Tamm and Leventhal). At about 9:30 p.m. on the same date, the court entered its order (Chief Judge Bazelon dissenting), denying both the petition for mandamus and the application for a stay. Each of the members of the panel filed a statement in connection with the order. Judge Tamm was of the view that the district court lacked jurisdiction to enjoin a court martial, since military review procedures and post-conviction *habeas corpus* were the exclusive remedies for one whose constitutional rights were violated by a military prosecution. Judge Leventhal apparently believed that the district court had jurisdiction, but was of the opinion that the adequacy of military remedies and conceptions of separation of powers as between military and civil authority required the conclusion that Levy's complaint stated no claim for equitable relief by injunction. Accordingly, refusal to convene a three-judge district court was held proper. In dissent, Chief Judge Bazelon reviewed the authorities and concluded that neither the question of jurisdiction, or that of equity, nor any other defense raised against Levy's suit was so clearly settled in law as to permit its resolution by a single district judge, in the face of the congressional command that such matters be heard by a three-judge district court. Taking his cue from *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713 (1962), Judge Bazelon noted the extremely restricted role of the single district judge in three-judge litigation. "When an application for a statutory three-judge court is addressed to a district court,

the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *Id.* at 715. Applying this standard, Judge Bazelon thought it plain that Levy's complaint was the stuff for three-judge adjudication, "and the applicable jurisdictional statute therefore made it impermissible for a single judge to declare the merits of the case, either by granting or withholding relief." *Ibid.* It followed that a stay of the court martial should have been granted, lest the district court's erroneous refusal to summon three judges have the practical effect of totally "withholding relief." The order of the Court of Appeals and the statements filed in connection with it are set forth in the Appendix, pp. 46-53, *infra*.

Application for a stay, pending petition for certiorari, was made to Chief Justice Warren, as Circuit Justice for the District of Columbia Circuit, on May 10, 1967, in a last-minute effort to restrain the court martial scheduled to begin that same morning. The stay application was referred by the Chief Justice to the Conference, and was denied by the Court on May 22, 1967, after the commencement of petitioner Levy's military trial.

Immediately thereafter, a petition for rehearing was filed in the Court of Appeals. That petition emphasized that the restraint of Levy's particular court martial was only one—albeit the most immediate—object of the *Levy* v. *McNamara* lawsuit. It pointed to the prayers for injunctive and declaratory relief against the challenged sections of the U. C. M. J., and it adverted to the continuing *in terrorem*

effect of Articles 133 and 134 upon the exercise of free speech by military personnel. It urged that the Court of Appeals reconsider, unembarrassed by the pressures of the original litigation in that court designed to stave off Levy's court martial, whether a three-judge court was not required to hear Levy's class-action claims against the general use of Articles 90, 133 and 134 to suppress the expression of unpopular views in the military. Rehearing was denied June 7th.

The following matters, although not of record herein, may be thought pertinent by the Court in determining this petition for certiorari. They are matters of public record in cases pending or concluded in the lower courts.

Captain Levy was convicted June 2, 1967 by a general court martial for violation of Articles 90, 133 and 134. He was sentenced to three years confinement at hard labor, dismissal from the service and forfeiture of all pay and allowances. His case is presently wending its way through the many stages of required military appeals. Since his conviction Captain Levy has been confined, under guard, in the United States Army Hospital at Fort Jackson.

A request for bail or other release from confinement pending appeal was made to his commanding officer, General E. B. Roberts. Even though officers are generally not confined while a court martial conviction is being reviewed except in cases of heinous crimes, General Roberts, on June 3 and again on June 12, ordered that Levy's confinement be continued. His stated considerations at this time were, principally, the purported impact that Levy's freedom

might have upon the morale and discipline of military personnel, and concern for Levy's safety. The Secretary of the Army was asked to review this decision. He declined to do so.

Petitions for writs of habeas corpus, bail pending appeal or relief in the nature of mandamus were addressed to the United States Court of Military Appeals and to the United States District Court for the Eastern District of South Carolina. The District Court held on July 6 that, the matter of bail was entirely within the discretion of the commanding officer, and denied *habeas corpus*. *Levy* v. *Resor*, E. D. S. C., C. A. No. 67-442, decided July 6, 1967. On July 7 the petition for the writ was also denied by the Court of Military Appeals. *Levy* v. *Resor*, U. S. C. M. A., Misc. No. 67-9, decided July 7, 1967.

Attached to the government's return and answer to the petitions for habeas corpus or bail in both actions was an affidavit of General Roberts, sworn July 26, alleging that he had learned from a confidential source, on May 31 (when Captain Levy was not under confinement), that Levy had told a close associate that if convicted he planned to apply for bail, flee to a communist country, seek political asylum, denounce the United States, and subsequently return to this country, where he expected to be received in view of the country's lenient treatment of defectors. The General also alleged that Captain Levy was affiliated with the Socialist Workers Party. Finally he intimated that the petitioner had suicidal tendencies. Since neither in the Court of Military Appeals nor in the South Carolina District Court had Levy had an evidentiary hearing on his petitions for bail, he filed a Motion for Reconsideration in the District Court, putting into issue the truth of the statements made by Gen-

eral E. B. Roberts. Captain Levy denied all of the allegations of the Roberts affidavit and asserted that the story of his plans to flee and seek political asylum in a communist country had been "concocted from whole cloth." The Motion for Reconsideration was denied July 10. Levy noted his appeal to the Court of Appeals for the Fourth Circuit. The District Court has denied his application for bail pending the appeal.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to review the standard employed by the District Court and the Court of Appeals to determine the scope of the issues that may be decided by a single judge in three-judge litigation.

Petitioner Levy's complaint for injunctive and declaratory relief in the district court had several obvious hurdles to surmount. First, there was the question that District Judge Corcoran characterized as a matter of "subject matter jurisdiction": whether a civil court has power to restrain the enforcement of military penal laws, and to enjoin a court martial? Second, there was a congeries of other threshold questions best described as matters of "equity" or "equitable jurisdiction": whether there was an adequate showing of irreparable injury, inadequacy of legal remedies, exhaustion of other remedial processes, etc.? Third, there was the merits of the controversy. By the nature of the thing, obviously, most litigations subject to the three-judge statutes, 28 U. S. C. §§2281-2284, pose a similar register of issues.

Judge Corcoran did not reach the merits. He declined to entertain the lawsuit, or to summon a three-judge court to entertain it, on grounds expressly couched in terms of "jurisdiction" but which also might be conceived under the rubric of "equity." However this may be, the characteristics of the grounds of his decision were these: (1) The issue he decided had not previously been determined by a controlling decision of this Court, nor was its resolution a matter of relatively simple deduction from closely analogous decisions of the Court. (2) The issue had not been determined by a uniform body of lower court decisions; indeed, it was properly a matter of first impression. (3) The arguments in favor of the district court's jurisdiction (or of equity) were not palpably trivial; they rested upon a recent epochal decision of this Court, *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), whose scope has not yet been fully resolved but whose purport had strong and obvious relevance (as we shall show in the next section of this Petition) for the argument in favor of jurisdiction (or equity), to support which it was cited. The issue to be determined therefore, was one which confronted the district court as *res nova,* and required it to chart the lines of probable progression of a relatively fresh decision by this Court, whose general implications and development were not yet clear. Specifically, that issue was: does *Dombrowski* authorize the federal civil injunction of military penal statutes and prosecutions alleged (and with obvious sound basis) to overreach the First Amendment freedoms?

Judge Corcoran decided that issue alone, without convening a statutory three-judge court. The importance of his decision for the development of *Dombrowski* and of the relationship between the civil and military jurisdictions of

the United States is discussed in the next section. What we emphasize here is its significance for the administration of the three-judge scheme enacted by Congress as the procedural vehicle for litigation of controversies such as this one.

This Court's decisions under the three-judge laws establish several basic points, we believe. First, in a suit meeting the formal requirements of §2281 or §2282 (an action against a state or federal official seeking restraint of the enforcement of a state or federal statute, as the case may be, on grounds of its unconstitutionality), one judge may no more deny relief than he may grant it. *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911); *Ex parte Northern Pacific Ry. Co.*, 280 U. S. 142 (1929). Second, this is true even though the denial of relief may be placed on some threshold ground—jurisdiction, equity, abstention, etc.—rather than on the merits. *Stratton* v. *St. Louis Southern Ry. Co.*, 282 U. S. 10 (1930); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715 (1962). Third, a single district judge may deny, or he may grant, relief where the constitutional controversy on the merits is illusory—put another way, where the constitutional issue is frivolous. *Ex parte Poresky*, 290 U. S. 30 (1933); *Bailey* v. *Patterson*, 369 U. S. 31 (1962). The converse of frivolity has been spoken of as a "substantial" constitutional question, as in the Court's aphoristic summary in *Idlewild Bon Voyage*, *supra*, 370 U. S. at 715, restricting single-judge consideration to the issues: "whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

The third determination doubtless means nothing more than a screening to assure that the statutory requisites respecting parties, relief sought, and the nature of the controversy are met. The first, relating to the substantive constitutional question, is explicated by *Poresky, supra,* and *California Water Service Co.* v. *City of Redding,* 304 U. S. 252, 255 (1938), and has been adequately implemented by the Courts of Appeals. E.g., *Reed Enterprises* v. *Corcoran,* 354 F. 2d 519 (D. C. Cir. 1965); *Stamler* v. *Willis,* 371 F. 2d 413 (7th Cir. 1966). It remains, however, quite unclear whether the second determination, relating to equity (and to jurisdiction, where that is not obvious) is intended to be governed by the same standard of "substantiality" as the first, or by a stricter or laxer standard. See Currie, *The Three-Judge District Court in Constitutional Litigation,* 32 U. CHI. L. REV. 1, 20-29 (1964). We believe that the purposes of the three-judge statute, as explicated in the Court's decisions, call for the same standard; that is, that in matters of "jurisdiction" and "equity" as well as on the merits, a single district judge may decide an issue only if it is frivolous or unsubstantial.

But we suggest it is palpable that District Judge Corcoran and the Court of Appeals below either (1) did not apply this standard in the present case, or (2) held that a question may be "frivolous" although it has the characteristics described in the second paragraph of this section, *supra* —i.e., is a question of first impression whose resolution involves considerable extrapolation from a recent, innovative decision of this Court. Either possible ground of decision is vitally important and, we submit, merits review here. This is so for several reasons.

The history of the Court's development of constitutional law in recent decades (the law, of course, which exclusively is involved to invoke three-judge procedures) has been a story of increasing availability of federal judicial remedies for the deprivation of the constitutional rights of the citizen. The reapportionment decisions, *Bond* v. *Floyd*, 385 U. S. 116 (1966); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), and *Dombrowski* itself are among the foremost examples. In this state of development, to permit the district judges, sitting alone, to throw out otherwise proper three-judge actions under a standard (or citerion of "frivolity") which preempts three-judge consideration of complaints seeking sorts of constitutional redress that are concededly novel but visibily supported by recent doctrinal trends in the Court's decisions—on no stronger basis of rejection than that they *are* novel—is intolerable.

This is the more true because of the modern-day evolution of the three-judge court. Originally designed to protect statutes against precipitate invalidation by district judges, the three-judge court mechanism has more lately come to be an important instrument for the protection of the citizen against unconstitutional legislation (particularly of the States). The influence of the circuit judges in this development is a matter of common knowledge. The importance of the immediate convening of a statutory court under §2284, particularly in civil rights and civil liberties cases, is therefore enormous. It is so particularly because preliminary relief is often required in those cases, and often required with urgency. The present case is a classic instance of the need for such relief—and of the complete frustration of needed interim relief by reason of the failure to follow the required statutory procedure. The

case is, therefore, a peculiarly appropriate vehicle for the Court to clarify and enforce the procedures mandated by §§2281-2284. In addition, the range of threshold issues presented here, and their problematic characterization as "jurisdictional" or "equitable," provides an extraordinary opportunity for plenary consideration of the role of the single judge in three-judge controversies. See the discussion of the range of unsettled questions bedeviling administration of the three-judge statutes in *Currie, supra,* at 24-26, 28-29.

II.

Certiorari should be granted to determine whether the rule of *Dombrowski* v. *Pfister* applies to military penal legislation and military prosecutions.

At the heart of this litigation is the question whether *Dombrowski* v. *Pfister,* authorizing federal injunction (in at least some circumstances) of state penal statutes and criminal prosecutions that broadly overreach First Amendment freedoms, authorizes by parity of reasoning (and under similar circumstances) the injunction by a federal court of military penal statutes and criminal prosecutions having a similar "chilling effect" on constitutionally protected expression. In short, does *Dombrowski* apply to the military? The courts below answered that question in the negative (Chief Judge Bazelon dissenting). Several aspects of their answer deserve brief emphasis at the outset, before we pass to the reasons why it merits review by this Court.

Initially, it is significant that the decisions below rejecting the application of *Dombrowski* in military matters,

were made on the face of petitioner's complaint, before answer, and hence without giving petitioner any opportunity for factual development of his case. In this posture of the litigation, those decisions necessarily hold that no provable state of facts—even facts identical to those of the *Dombrowski* case itself—could bring a military penal statute or prosecution within the rule of *Dombrowski*. Indeed, the opinions supporting the decisions state this proposition rather baldly; their rationale is a categorical hands-off-the-military.

In addition, the determination that this doctrine could properly be announced by a single judge in a three-judge lawsuit necessarily assumes—even under the most liberal view of the powers of one judge in three-judge matters—that the doctrine is pretty plainly right. The decisions below, then, establish that *Dombrowski* has *no* application to the military, and that it *clearly* has no application to the military. Subsequent suits by military personnel to enjoin military penal legislation, whatever the nature of the legislation or the circumstances of the suit, may expect short shrift. One can realistically predict that they will be the object of routine and relatively unconsidered orders of dismissal, at least in the District of Columbia. And the District is, of course, the necessary place of venue of most such suits, and the logical place of venue of nearly all.

These considerations intensify, we believe, the force of the following reasons why the *Dombrowski* issue should be reviewed by this Court now, and in petitioner's case.

A. *The* Dombrowski *issue is a question of first impression and of vital importance to the constitutional protection of vast numbers of American citizens.*

In *Dombrowski* this Court concluded that the threat of state prosecutions under vague statutes overreaching First Amendment freedoms so oppressively restrained the exercise of those preferred freedoms, that immediate federal injunctive and declaratory relief was required to protect them. In this limited but crucial area, the Court therefore subordinated the competing (and elsewhere compelling) considerations that ordinarily caution against federal judicial intervention into unconcluded state criminal proceedings—the considerations that underlie the abstention doctrine, the exhaustion doctrine, the doctrine of *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943), and that of *Stefanelli* v. *Minard*, 342 U. S. 117 (1951), and *Cleary* v. *Bolger*, 371 U. S. 392 (1963). These latter considerations had long been given great weight by the Court, as any reading of the cited decisions unmistakably shows. Together they had respected with impressive continuity the conception that the state courts constituted a system of "'distinct and independent tribunals'" with which the federal judiciary steadfastly declined to interfere. *Ex parte Royall*, 117 U. S. 241, 252 (1886). Nonetheless, the extraordinary danger posed by dragnet state criminal legislation to the "delicate and vulnerable . . . supremely precious" freedoms of the First Amendment[3] required extraordinary federal judicial remedies for their protection; and *Dombrowski* authorized those remedies, to the full extent of the need

[3] *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433 (1963).

for them, even at the cost of some federal intrusion into the bailiwick of the state courts.

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. . . . When the statutes also have an overbroad sweep, . . . the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of these rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. . . . For '[t]he threat of sanctions may deter * * * almost as potently as the actual application of sanctions * * *' . . . Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." 380 U. S. at 486.

On the face of it, this logic of *Dombrowski* applies as well to military penal legislation having an "overbroad sweep" in the First Amendment area as to similar state penal legislation. True it is that the institution of the military, and the military courts, have long been recognized as a system separate and apart from the federal civil courts, and ordinarily immune against intrusions by them. But so have the institution of the States, and the state courts. The traditional autonomy of the military

tribunals has had its exact parallel in state judicial autonomy, and that parallel has several times been explicitly drawn by opinions of this Court in military cases. *Gusik* v. *Schilder*, 340 U. S. 128, 131-132 (1950); *Burns* v. *Wilson*, 346 U. S. 137, 140, 142 (1953). The *Dombrowski* holding marks the limitation of one of those parallel autonomies under our constitutional scheme of government; and the question arises whether it does not also mark the limitation of the other. That question is one of first impression in this Court. It is the question squarely presented by petitioner Levy's case. We submit it is an important and vitally timely question, which the Court should grant *certiorari* to decide.

One measure of its importance is the number of persons potentially affected by it. The Office of Information, Department of Defense, informs us that on June 30, 1966, active military personnel for all services numbered 3,093,356—a figure greater than the populations of twenty-nine American States. In addition, on the same date, the Ready Reserves (inactive) numbered 1,965,626; the Stand-by Reserves, 467,650; and those retired, 335,000. The significance of these figures, and of other more subtle indicators of the role of the modern military establishment in contemporary life, has been described by the Chief Justice:

> ". . . events quite unrelated to the expertise of the judiciary have required a modification in the traditional theory of the autonomy of military authority.
>
> "These events can be expressed very simply in numerical terms. A few months after Washington's first inauguration, our army numbered a mere 672 of the 840 authorized by Congress. Today, in dramatic

contrast, the situation is this: Our armed forces number two and a half million; every resident male is a potential member of the peacetime armed forces; such service may occupy a minimum of four per cent of the adult life of the average American male reaching draft age; reserve obligations extend over ten per cent of such a person's life; and veterans are numbered in excess of twenty-two and a half million. When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question." Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181, 187-188 (1962) (The James Madison Lecture, 1962).

A second measure of the question's importance—a distressing one—is the accumulating evidence that military prosecutions are being used broadly to stifle the freedom of expression of servicemen. The articles of the U. C. M. J. challenged by petitioner Levy in the present case seem to be particularly serviceable for the purpose. Just last month, for example, the Court of Military Appeals sustained the court-martial conviction of Army Second Lieutenant Henry H. Howe, Jr., for violations of Article 133 and Article 88 ("contemptuous words against the President") on the basis of Howe's participation in a peace demonstration in November 1965, while off duty and in civilian clothes. Howe walked in a line of demonstrators carrying a placard that said, "End Johnson's Fascist Aggression in Viet Nam," on one side and, "Let's Have More Than A Choice Between Petty Ignorant Fascists in 1968," on the other. *United States* v. *Howe*, U. S. C. M. A. No. 19846, decided August

4, 1967. The prosecution and conviction of Private Andrew D. Stapp at Fort Still, Oklahoma, for refusing to obey an order to open his foot locker and disclose the allegedly radical reading material he kept inside, has received national notoriety. See *New York Times,* May 31, 1967, 53:5; June 2, 1967, 6:4. Other military arrests and prosecutions for anti-war protest activity and related offenses are also increasingly reported. See, e.g., *New York Times,* January 22, 1966, 6:4; July 8, 1966, 1:2; July 15, 1966, 3:2.

Third, the "chilling effect" of such prosecutions cannot be overstated. Petitioner Levy's case presents an extraordinarily vivid example.[3]

Following his failure to obtain injunction of his military trial, Captain Levy was tried by a court martial composed solely of career officers of rank superior to him. The majority of those who tried him were from the South; four were veterans of the Viet Nam conflict, and one had lost an eye there in a mine field. Medical personnel and women were excluded. The court martial lasted for nearly a month.

On June 2, 1967, Captain Levy was convicted. That night he was neither confined nor restricted, but the next day, after the imposition of a sentence of three years imprisonment, the Executive Officer grasped him, clapped handcuffs on him, and pushed and shoved him from the courtroom. His counsel were falsely advised as to his destination. They were halted by a cordon of military

[3] The circumstance that petitioner has been tried and convicted by a court martial since the date of filing of his complaint in the district court action herein does not, of course, moot his class-action claim for general injunctive and declaratory relief. Indeed, his prosecution, and its harrowing incidents, serves only to intensify the *in terrorem* effect of the statutory provisions he challenges.

police and by road blocks as they attempted to follow the automobile that carried him away. See *New York Times*, June 4, 1967, 1:3.

Since that day, Captain Levy has been confined to a room in the Army Hospital at Fort Jackson. He is not permitted to speak to enlisted men and, since there are no other officers held there, he is for practical purposes in solitary confinement. A labyrinth of bureaucratic procedures and regulations make it difficult for him to confer with his attorneys. See *New York Times*, June 5, 1967, 22:4.

Captain Levy has been denied bail pending military appeals. Requests for some form of release pending appeal were addressed to his commanding officer (twice), to the Secretary of the Army, to the United States District Court for the Eastern District of South Carolina, and to the United States Court of Military Appeals. The consensus of their dispositions of his applications is that bail pending appeal is not required in military cases, and that the decision whether to confine or release a military convict rests in the unfettered and unreviewable discretion of his commanding officer.

One of the principal stated bases of the exercise of that discretion by Captain Levy's commanding officer (as enumerated in his letter of June 12, denying Levy's second request for release) is instructive. The Commanding Officer, General E. B. Roberts, "considered, among other things, the impact upon morale and discipline of military personnel stationed at Fort Jackson and throughout the Armed Services of any removal of all restraint as suggested . . . ." In this usage, and as applied to Levy's charge and conviction for political expression, "morale

and discipline," is a beguiling euphemism for the "chilling effect" of which *Dombrowski* spoke.

Captain Levy's resort to judicial remedies in an attempt to secure his liberty during the extended period of military appeals (estimated at eighteen to twenty-four months), did have one significant consequence. It got him defamed. On June 26, General E. B. Roberts, swearing out an affidavit in opposition to Levy's applications for habeas corpus, produced a ground for restraining Levy pending appeal that had not been mentioned in the General's two earlier letters. Roberts averred that, on May 31, 1967 (when Levy was not in confinement) he had learned (perhaps indirectly) from a reliable confidential informant that the informant had learned in turn that Levy had expressed to an unidentified close associate, the following:

> "his intention upon conviction to seek bail, and, having been released thereon, to flee the United States to a communist country, seek political asylum therein, remain absent from the United States for a period of several years, during which time he would denounce the United States, and that after several years he would contact an American embassy in the communist country and request permission to return to the United States; and that he fully expected this request would be granted in view of the lenient treatment of defectors by the United States."

Captain Levy himself avers that this extraordinary tale is concocted from whole cloth. But he has so far been denied any forum in which he can challenge factually the truth of the Roberts affidavit.

The upshot of this proceeding is that the more than three million personnel currently serving on active duty in the armed forces of the United States are put on notice, *that*: if they express opinions and ideas unpopular with the military establishment and are prosecuted for conduct unbecoming an officer and a gentleman, or something vaguer under Article 134, the First Amendment *may* protect them in the end, *provided* they are willing to: face a trial before a military court, be slapped into handcuffs at its conclusion, suffer confinement under harsh conditions for a prolonged period, forego the possibility of release pending appeal; or, if they seek release or bail pending appeal, subject themselves to preposterous and abusive slander. This may be, indeed, an optimistic assessment. It must be remembered that Captain Levy is white, a professional man of middle-class background, highly articulate and literate, and an officer. Those members of the class which he represents who lack any of these attributes may not fare quite so well.

And, of course, there is no assurance that Captain Levy's First Amendment rights will be vindicated in the end. After he has been sufficiently abused and his appeals sufficiently protracted, the Army may unilaterally decide at any time to remit his unserved time, release him from confinement, discharge him, and thus remove his case from the timely and effective cognizance of any civilian court. See, e.g., *Miller* v. *United States*, 324 F. 2d 730 (10th Cir. 1963).

This is an exceedingly high price to pay for the expression of one's political views and opinions. The prospect of paying it is an exceedingly frightening prospect, and therefore, we suggest, a commensurately effective engine of repression mounted against three million American

citizens. But the vice does not stop there. Whatever distinctions may be imagined between *Dombrowski* and its military parallels, one insight of the *Dombrowski* opinion is indistinguishably applicable. "[F]ree expression [is] . . . of transcendent value to all society, and not merely to those exercising their rights." 380 U. S. at 486. To conceive the issue posed by this litigation as an exclusively military concern is, for this reason, half-sighted. Stifling Captain Levy and his compeers diminishes us all —army men, civilians, opponents of the war in Viet Nam, its supporters, and those who don't know yet but would like to listen and find out. This insight—that not alone the speaker, but the listener is deprived when speech is unconstitutionally deterred—seems to us an additional reason why, on the merits, the boundaries of *Dombrowski* cannot be drawn so as to exclude from its protection military *speakers*. In any event, due recognition of the interest of the listener in this litigation makes it the more imperative that review be granted and that this Court confront and resolve the *Dombrowski* issue now.

B. *The narrow reading of* Dombrowski *by the courts below conflicts with the liberal reading given that decision by the Court of Appeals for the Second Circuit.*

In *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (2d Cir. 1967), a distinguished panel of the Court of Appeals for the Second Circuit took the view that *Dombrowski* compelled the granting of an injunction against a Selective Service Board reclassification shown to be an impermissible act of retaliation for a registrant's participation in demonstrations protesting the war in Viet Nam. Speaking for himself and for Judges Friendly and Smith, Judge Medina acknowledged that:

"Irrespective of the existence of the power to do so, the courts, and particularly this Court, have been extremely reluctant to bring any phase of the operation of the Selective Service System under judicial scrutiny. The very nature of the Service demands that it operate with maximum efficiency, unimpeded by external interference. Only the most weighty consideration could induce us to depart from this long standing policy. But of all constitutional rights, the freedoms of speech and assembly are the most perishable, yet the most vital to the preservation of American democracy. Historically, these preferred and paramount rights have continually come under attack from the best intentioned sources. And once the erosion of these rights is permitted to begin, it is exceedingly difficult to halt and the intervening damage may be irreparable. Here it is the free expression of views on issues of critical current national importance that is jeopardized. On such topics perhaps more than any other, it is imperative that the public debate be full and that each segment of our society be permitted freely to express its views. Thus the allegations of the complaint in this case that the draft boards have unlawfully suppressed criticism must take precedence over the policy of non-intervention in the affairs of the Selective Service." 372 F. 2d at 822.

The court then addressed specifically, under the heads "subject matter jurisdiction," "justiciability," and "exhaustion of administrative remedies", each of the considerations (whether identically or merely similarly designated) thought by Judges Corcoran, Tamm and Leventhal to preclude judicial relief in petitioner Levy's case. As the Sec-

ond Circuit read *Dombrowski*, these objections crumbled under the weight of the judicial obligation to fashion efficient and, if need be, extraordinary remedies for the vindication of threatened First Amendment rights.

> "... Quite similarly to our case, the Supreme Court [in *Dombrowski*] allowed that the inconvenience which normally accompany a prosecution were insufficient to invoke federal court intervention and that the rights of the appellants could ultimately be vindicated through the normal procedures. Nevertheless, the Court reversed the District Court and held, first, that irreparable injury had been alleged and, second, that abstention was not appropriate. Regarding the first point, the Court said:
>
> > [T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." 372 F. 2d at 824.

Although the decision in *Wolff* and that rendered by the courts below are not technically inconsistent—the one involving federal judicial intrusion into the Selective Service process; the other, federal judicial intrusion into the administration of military penal law—the guiding spirit by which they are decided and the construction which each puts upon *Dombrowski* are irreconcilable. *Wolff* analogizes

the traditional hands-off attitude displayed by the federal courts with regard to Selective Service operations to the traditional hands-off attitude of federal courts as regards state criminal proceedings; and it accepts the *Dombrowski* limitation upon the latter as logically compelling a similar limitation of the former. Obviously, the hands-off attitude of the federal courts toward Selective Service is part and parcel of the general reluctance of those courts to become embroiled in military affairs, and responds to considerations identical to those thought controlling by the district and circuit courts below in petitioner Levy's case. The courts of the District of Columbia, however, declined to accept the Second Circuit's view that those considerations were subordinated by the logic of *Dombrowski* in First Amendment cases. While *Wolff* carries *Dombrowski* to the porches of the military establishment, the *Levy* courts (Judge Bazelon dissenting) firmly decline to recognize *Dombrowski's* presence on the military horizon. It is impossible to read the opinions in the respective cases without concluding that the Second Circuit has tuned in on *Dombrowski,* in this broad area of military administration, while the District of Columbia has brusquely dialed it out. This Court should grant *certiorari* here to disentangle *Dombrowski* from the toils of these discordant views.

C. *It is particularly appropriate to grant review in petitioner's case at the present time because of the pendency of other cases before the Court that raise broad questions of the scope and significance of the* Dombrowski *decision.*

This Court has heretofore noted probable jurisdiction of an appeal in *Zwickler* v. *Koota,* 261 F. Supp. 985

(E. D. N. Y. 1966), where a three-judge district court has all but overruled *Dombrowski*. O. T., 1967, No. 29. A jurisdictional statement has been filed in the second round of the *Cameron* v. *Johnson* litigation, but has not yet been acted upon by the Court. See *Cameron* v. *Johnson*, 381 U. S. 741 (1965); *Cameron* v. *Johnson*, 262 F. Supp. 873 (S. D. Miss. 1966); O. T., 1966, Misc. No. 1773. More recently, a jurisdictional statement was filed in a case coming from Wisconsin, *Zwicker* v. *Boll*, O. T., 1967, Misc. No. 573, in which a three-judge district court split three ways regarding the import of *Dombrowski*. It is apparent that this Term will see the Court faced with issues requiring fundamental consideration and development of the *Dombrowski* principle. Hearing of petitioner's case together with the others reviewed by the Court will broaden that consideration and development through the addition of the fresh perspective supplied by *Dombrowski's* confrontation with the military.

D. *In their rejection of* Dombrowski, *the courts below have given a broad reading to this Court's decision in* Gusik *v.* Schilder, Orloff *v.* Willoughby, *and* Beard *v.* Stahr, *which sets those decisions into conflict not merely with the rationale of* Dombrowski, *but also with the Court's holdings in* Toth *v.* Quarles *and* Reid *v.* Covert.

In his opinion declining to convene a three-judge court, District Judge Corcoran distills from such decisions as *Gusik* v. *Schilder*, 340 U. S. 128 (1950); *Orloff* v. *Willoughby*, 345 U. S. 83 (1953); and *Beard* v. *Stahr*, 370 U. S. 41 (1962), the broad principle that the federal civil courts have "no jurisdiction, by way of a three-judge court or otherwise, to interfere with the operation of the military." At the circuit level, Judge Tamm apparently agrees, and

would hold post-conviction habeas corpus—following exhaustion of military appeals—the exclusive mode of review of military criminal matters by the civilian courts. Judge Leventhal puts the issue as one of equity, but relies essentially upon the same line of authorities to support the finding of "a judicial tradition which for more than 150 years has resisted all efforts to issue mandates intended to obviate exposure to court martials or anticipate the results of proceedings before military tribunals."

These views grossly exaggerate the force of this Court's decisions restricting federal judicial intervention into military affairs. *Gusik* is nothing but a run-of-the-mill application of the exhaustion doctrine, familiar in the federal habeas corpus jurisprudence applicable alike to state and military prisoners. The case does not hold that civilian courts can never issue process to anticipate and stop military court-martial proceedings, but only that it is ordinarily inappropriate to do so when military remedies appear adequate. Where the Court has thought it necessary, in extraordinary situations, to intrude the judicial power of the United States into unconcluded court-martial proceedings, it has done so, *Toth* v. *Quarles*, 350 U. S. 11 (1955); *Reid* v. *Covert*, 354 U. S. 1 (1957)—just as it has intruded that power into unconcluded state criminal proceedings in extraordinary situations where state remedies were inadequate. E.g., *In re Neagle*, 135 U. S. 1 (1890). The decision in *Dombrowski* defines just such an extraordinary situation, of course. But the courts below will brook no exceptions; they insist on finding in the old books (quite wrongly, we submit) an inflexible and categorical principle of general application that perceives the "military establishment as an enclave beyond the reach of the civilian courts." War-

ren, *supra*, 37 N. Y. U. L. Rev. at 188. Particularly at this point in history, we submit, the Court should be quick to revise and repudiate any such conception—going as it does far beyond anything decided by the Court even in earlier and more authoritarian eras.

Surely the line of decisions other than *Gusik* relied upon below—*Orloff; Beard; Reaves* v. *Ainsworth*, 219 U. S. 296 (1910), and like decisions—establish no such principle. All of those cases involved attempts to embroil the federal courts in the routine administrative processes of the military services. None involved military criminal prosecutions, and particularly none involved military prosecutions that threatened to affect First Amendment freedoms. Even in the armed forces, a criminal prosecution is not a mere routine, quotidian detail, a matter of internal housekeeping. It is a unique and drastic procedure, having all of the purposes and effects of a civilian criminal proceeding—deterrence, punishment, and what is mildly called "incapacitation." Procedures so grave as this are not committed to the military establishment, under our Constitution, unfettered by the basic safeguards of the Bill of Rights, or unencumbered by the precious inconvenience of civilian judicial scrutiny, necessary to make those basic safeguards work. Ordinarily, of course, the civilian judicial scrutiny of military criminal administration is adequate if it comes at the termination of a military prosecution; and ordinarily—as in state criminal matters—it is properly reserved until that time. But where vague and overbroad criminal liability threatens First Amendment freedoms with a pall of repression, *Dombrowski* establishes that "[t]he assumption that defense of a criminal prosecution [and post-conviction federal judicial review] will generally assure ample vin-

dication of constitutional rights is unfounded." 380 U. S. 486. Petitioner Levy's case graphically demonstrates how unfounded is that assumption in the military. We submit that the *Dombrowski* consequence properly follows from the demonstration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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